TERRANCE SIMON MARBECK

v.

KERAJAAN MALAYSIA

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[ORIGINATING SUMMONS NO: 24-358-2002]
20 FEBRUARY 2003

CIVIL PROCEDURE: *Preliminary objection - Procedural and technical objection - Failure to comply with O. 28 r. 3(4) of the Rules of the High Court 1980 - Principles applicable - Rules of the High Court 1980, O. 1A, O. 2 r. 3 - Rules of the Court of Appeal 1994, r. 3A*

CONTRACT: *Construction - Loan - Rate of interest - Whether defendant reserved right to vary rate of interest - Whether defendant estopped from varying rate of interest - Whether such variance constituted a breach of loan agreement*

LIMITATION: *Accounts, action for - Commencement of limitation period - Whether plaintiff acted prematurely in raising s. 21(1), (2) and (5) of the Limitation Act 1953 - Whether defendant's notice of demand for payment was within limitation periods s. 21(1), (2) and (5) of the Limitation Act 1953 - Limitation Act 1953, s. 21(1), (2), (5)*

This was the plaintiff's application seeking a declaration that the defendant, in accordance with the letter of repayment dated 22 May 1982 issued by the secretary general of the Treasury, was only entitled to receive from the plaintiff payment of the sum of RM820.09 monthly until February 2006 as the due monthly installment in respect of a housing loan facility that was granted by the defendant to the plaintiff on 22 October 1980, and that the defendant be estopped from asserting otherwise.

The plaintiff argued that, contrary to the O. 28 r. 3(4) of the Rules of the High Court 1980, the defendant's affidavit in reply was only filed and served on the plaintiff's solicitors on 24 October 2002, and that, since the plaintiff's consent had not been sought nor was there any application by the defendant for an enlargement of time, there was no proper affidavit in reply to the plaintiff's originating summons. The plaintiff further submitted that the defendant was estopped from altering the rate of interest applicable to the loan facility

as the defendant would breach the term for repayment contained in the letter in which the defendant did not reserve the right to vary the interest rate. The plaintiff also relied on ss. 21(1), (2), (5) and 33 of the Limitation Act 1953 ('the Act') to preclude the defendant from taking any action against the plaintiff, adding that the defendant had delayed and could not choose to resurrect by notice of demand dated 29 July 2002 a cause of action which had long since been dead, and which the law and justice precluded from enforcing.

Held:

[1] The preliminary objection on the issue of the time required for filing and serving the defendant's affidavits strictly revolved around a technicality. By virtue of the parallel and equipollent provisions in r. 3A of the Rules of the Court of Appeal (Amendment) 2002, and O. 1A and O. 2 r. 3 of the Rules of the High Court (Amendment) 2002, which manifested the intention of the Rules Committee to provide for the smooth administration of justice by way of the substantial merits of the case and not merely on procedural technical objections, the preliminary objection was overruled. (pp 124 h & 125 g)

[2] Upon a proper perusal and construction of the loan agreement, it was plain that the defendant as the lender reserved the right from time to time, by a notice in writing, to evince an intention to increase or reduce the said rate of interest. These written notices constituted expressions of the rights reserved to the defendant under the loan agreement, and by no stretch of the imagination, could they be construed as the defendant's breaches of the loan agreement. Therefore, the plaintiff's contention that estoppel operated against the defendant in the instant case could not be sustained. (p 129 a-d)

[3] It was premature of the plaintiff to raise s. 21(1), (2) and (5) of the Act at this stage of the originating summons as the defendant, the chargee in the instant case, had neither brought a foreclosure action under s. 256 of the National Land Code and O. 83 of the Rules of the High Court 1980 in respect of the charge in question nor any action to recover the arrears of interest payable in respect of the charge in question. In any event, the plea of limitation could not militate against the defendant as the facility was in the form of a continuing account, in which case the period of limitation would not have begun to run until a demand had been made by the defendant. In the instant case, the defendant's notice of demand for payment was issued to the plaintiff on 8 March 2002 in which case

11 months had elapsed, and it was still within any of the limitation periods prescribed in the aforesaid provisions of s. 21(1), (2) and (5) of the Act. (pp 131 e & 132 f)

[Application dismissed.]

Case(s) referred to:

Beauford Baru Sdn Bhd v. Gopalan Krishnan VK Gopalan [2002] 3 CLJ 686 HC ***(refd)***

Boustead Trading [1985] Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(dist)***

Foo Yoke Choon v. Public Bank Bhd [2000] 3 CLJ 405 CA ***(refd)***

Kerajaan Malaysia v. Mohd Mokhtar bin Ali [1996] 1 CLJ 816 HC ***(foll)***

Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd [2002] 1 CLJ 645 FC ***(foll)***

Megnaway Enterprise Sdn Bhd v. Soon Lian Hock [2003] 5 CLJ 103 HC ***(refd)***

Re Wan Ahmad Nasir Ngah Ibrahim, dec [1935] MLJ 60 ***(refd)***

United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin [2001] 2 CLJ 31 CA ***(foll)***

Legislation referred to:

Limitation Act 1953, ss. 21(1), (2), (5), 33

National Land Code, s. 256

Rules of the Court of Appeal 1994, r. 3A

Rules of the High Court 1980, O. 1A, O. 2 r. 3, O. 28 r. 3(4), O. 83

For the plaintiff - Terrance Simon Marbeck; M/s TS Marbeck & Co

For the defendant - Rafidah Omar SFC; Treasury of Malaysia

Reported by Suresh Nathan

JUDGMENT

Low Hop Bing J:

Declaratory Relief

By way of this originating summons in encl. (1), the plaintiff seeks a declaration that the defendant, in accordance with letter dated 22 May 1982 issued by the Secretary General of the Treasury, is only entitled to receive from the plaintiff payment of the sum of RM820.09 monthly until February 2006 as the due monthly instalment in respect of a housing loan facility that was granted by the defendant to the plaintiff on 22 October 1980 ("the facility") and that the defendant be estopped from asserting otherwise.

The plaintiff also prays that the defendant be ordered to deliver a statement of the redemption sum for the facility as requested by the plaintiff calculated on the basis of the monthly instalment of RM820.09 only.

Affidavits

The plaintiff affirmed and filed his affidavit in support on 19 September 2002 which was served on the defendant on 30 September 2002.

The plaintiff who appeared in person argued that contrary to O. 28 r. 3(4) of the Rules of the High Court 1980, the defendant's affidavit in reply was only filed and served on the plaintiff's solicitors on 24 October 2002, and that, since the plaintiffs consent has not been sought nor was there any application by the defendant for an enlargement of time, there was no proper affidavit in reply to the plaintiffs originating summons.

The plaintiff stressed that the defendant's other affidavit dated 12 November 2002 was served on the plaintiff's solicitor that afternoon when the plaintiff's summons was fixed for hearing on 14 November 2002.

As a consequence, the plaintiff submitted that the defendant had disregarded the rules governing procedure and so the plaintiff was entitled to the orders sought as the plaintiffs originating summons stood unopposed.

For the defendant, learned senior federal counsel Cik Rafidah Omar, contended that the court presiding over this case shall have regard to the justice of the case, relying on O. 1A and O. 2 r. 3 of the Rules of the High Court 1980, as amended in 2002. She requested the court to exercise its inherent jurisdiction to accept the defendant's affidavits or alternatively prays for an extension of time to file these affidavits, so that justice could be meted out, as it was a procedural non-compliance, without intending any disrespect to the court.

The relevant rule governing the service of the defendant's affidavits is contained in O. 28 r. 3(4) which is reproduced *in extenso* as follows:

> (4) Where the defendant intends to adduce evidence with reference to the originating summons served on him, he must also do so by affidavit and the affidavit must be filed and a copy thereof must be served on the plaintiff not later than 14 days after being served with a copy of the affidavit by the plaintiff under paragraph (2).

Having regard to the above provisions contained in O. 28 r. 3(4), since the plaintiffs affidavit was served on the defendant on 30 September 2002, the defendant must serve on the plaintiff an affidavit in reply on or before 14 October 2002. In the instant case, since the defendant's first affidavit was served on 24 October 2002, there has been a delay of ten days.

In respect of the defendant's second affidavit in reply, served on the plaintiff on 12 November 2002, when the hearing had been fixed for 14 November 2002, a delay of 28 days had been occasioned.

On these delays, while it is true that there had been no formal application for enlargement of time, there was in the submissions presented for the defendants an oral application for such an enlargement. I am inclined to grant the enlargement which I hereby do, as the facts of the case must be expressed in their entirety in order to enable the court to arrive at a proper decision.

Had the plaintiff applied for time to file further affidavits in reply, I would have had no hesitation in granting the application, more so as the hearing of this originating summons had proceeded by way of written submissions and there was indeed ample time to file the relevant affidavits. However, no such application, either formal or oral, was forthcoming or deemed necessary by the plaintiff.

In any event, I am of the view that the preliminary objection on the issue in respect of the time required for filing and serving the defendant's affidavits strictly revolves around a technicality. It used to be the trend to raise preliminary objections based on technical grounds.

As we move towards the era of facilitating the process of litigation, the raising of preliminary objections on technical grounds would certainly and clearly be a thing of the past. Quite recently, the Court of Appeal in *United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin* [2001] 2 CLJ 31 through the authoritative judgment of Ahmad Fairuz JCA (now PCA) expressly stated that preliminary objection on a mere technicality should not be allowed to obstruct the process of giving justice to the deserving, thereby overruling the procedural technical objection.

In *Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd* [2002] 1 CLJ 645, Mohtar Abdullah FCJ observed:

> The duty of the Federal Court, as the apex court, to ensure that justice is done far outweighs any procedural technicality preventing it from being done. ... The Federal Court must decide the case in the interest of justice, to redress the wrong and uphold the right, uninhibited by the technicalities strewn in its path.

The principles enunciated in the aforesaid judgments are further manifested in the parallel and equipollent provisions in r. 3A of the Rules of the Court of Appeal (Amendment) 2002 (PU(A) 196/2002) and O. 1A and O. 2 r. 3 of the

Rules of the High Court (Amendment) 2002 (PU(A) 197/2002) both of which came into force on 16 May 2002 in the following terms:

Preliminary objection on the ground of non-compliance shall not be allowed.	3A. A Court or Judge shall not allow any preliminary objection by any party only on the ground of non-compliance of any of these Rules unless the Court or Judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice.".

Court or Judge shall have regard to justice

1A. In administering any of the Rules herein, the Court or a Judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein.

Preliminary objection for non-compliance of rules not allowed (O. 2 r. 3)

3. A court or judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the ground of non-compliance of any of these Rules unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice.

It is clearly the intention and wisdom of the Rules Committee to provide for smooth administration of the due process of litigation and the administration of justice by way of substantial merits of the case and not on merely procedural technical objections. In my considered opinion, the advent of these amendments would mark the beginning of the end of learned counsel's urge to raise objections merely on strictly technical grounds and it is my fervent hope that learned counsel's preliminary procedural technical objections would henceforth be consigned to oblivion for good: see *Beauford Baru Sdn Bhd v. Gopalan Krishnan VK Gopalan* [2002] 3 CLJ 686; *Megnaway Enterprise Sdn Bhd v. Soon Lian Hock* [2003] 5 CLJ 103.

In the circumstances, I hold that this preliminary objection has been superseded by the aforesaid amendments and is hereby overruled.

Facts Of The Case

The facts of the case as affirmed in all the affidavits filed herein, thereby giving rise to the full picture, do not seem to be disputed.

Pursuant to the execution of a loan agreement and deed of assignment between the plaintiff and the defendant on 1 August 1980, the defendant had on 22 October 1980 granted the facility to the plaintiff in the sum of RM155,368

(inclusive of insurance premium) while the plaintiff was a legal officer in the judicial and legal service, from which the plaintiff resigned on 1 May 1982.

Prior to the plaintiffs resignation, the judicial department wrote a letter dated 23 February 1982 to the secretary general of the treasury regarding the plaintiffs resignation and the balance due on the facility.

Para 4. of the defendant's letter dated 22 May 1982 to the plaintiff stated as follows:

> 4. Sekiranya tuan/puan menyelesaikan tunggakan itu dalam tempoh yang ditetapkan, tuan/puan boleh membuat ansuran bulanan sebanyak RM820.09 sebulan mulai bulan Jun 1982 hingga bulan Februari 2006 iaitu untuk 284 bulan.
>
> [My translation:
>
> If you settle the arrears within the prescribed period, you may make a monthly instalment of RM820.09 per month commencing the month of June 1982 until the month of February 2006 ie, for 284 months.]

On 31 January 1985 some three years after the plaintiffs resignation, the defendant altered the rate of interest to 12% per annum and changed the monthly instalment payment. However, the plaintiff did not agree to this change and continued to effect repayments by monthly instalments of RM820.09.

On 12 September 1992, the defendant instituted legal proceedings against the plaintiff *vide* Melaka High Court Originating Summons No. 24-180-1992, which the plaintiff contested and was struck out with liberty to the defendant to file afresh. The defendant has not refiled any proceedings against the plaintiff who continued paying the same instalment of RM820.09 per month.

In early 2002, the plaintiff received an offer to purchase his house and requested for a redemption statement. *Vide* letter dated 8 March 2002, the defendant indicated to the plaintiff that the outstanding balance of the facility as at August 2002 was RM207,883.34.

On 29 July 2002, the defendant issued a notice of demand to the plaintiff for the aforesaid sum of RM207,883.34.

Estoppel

In relying on estoppel, the plaintiff submitted that the defendant was estopped from altering the rate of interest applicable to the facility as the defendant in doing so would breach the term for repayment contained in the letter dated 22 May 1982 which, the plaintiff added, the defendant did not reserve the right to vary the interest rate.

The plaintiff also contended that the defendant's failure to act against the plaintiff operates as an estoppel as the defendant had without protest or qualification accepted the payment of monthly instalments at RM820.09 tendered by the plaintiff and that since the plaintiff has resigned from service, the plaintiff ceased to be bound by fresh obligations in the defendant's circulars. The plaintiff cited the Federal Court decision in *Boustead Trading [1985] Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283 in support of his submission under this head.

For the defendant, it was submitted that estoppel did not operate against the defendant as the defendant's letter did not vary the terms and conditions of the loan agreement, and that various clauses in the loan agreement were applicable to the plaintiff, in that the defendant reserved the right to vary the rate of interest. Reliance was placed on *Kerajaan Malaysia v. Mohd Mokhtar bin Ali* [1996] 1 CLJ 816.

In my judgment, the doctrine of estoppel expounded by the Federal Court in *Boustead Trading*, *supra*, poses no problem at all. The facts of each case are in my view crucial to the applicability or otherwise of this doctrine. In *Boustead Trading, supra*, the facts of the case revealed that the appellant bought goods on credit from Chemitrade Sdn Bhd ('Chemitrade'). Chemitrade then entered into a factoring agreement with the respondent under which the respondent agreed to factor Chemitrade's book debts, ie the debts owed by the appellant to Chemitrade were assigned to the respondent. Notice of the assignment was given to the respondent. Chemitrade gave the respondent copies of the invoices in respect of each sale and delivery of goods to the appellant. The respondent then stamped the invoices with the indorsement that any objection was to be reported to the respondent within 14 days of its receipt, ('the indorsement') and sent them to the appellant. The appellant did not complain about any of the invoices within the 14-day period nor challenge the respondent's right to impose the 14-day period by way of the indorsement. The appellant paid the respondent on several of the invoices but later refused to make payment on 20 invoices ('the invoices'). The appellant argued that nothing was payable on the invoices due to a statement on the appellant's purchase orders that the amounts stated were to be offset against the cost of stocks returned to Chemitrade ('the statement'). The respondent denied knowledge of the statement and argued that since the appellant had not protested about the validity of the indorsement, it was entitled to assume the appellant had accepted it. The trial judge found for the respondent. The appellant appealed to the Federal Court, arguing, *inter alia*, that the respondent was in essence relying on estoppel.

The Federal Court explained that the respondent was able to rely on the doctrine of estoppel which is a flexible principle by which justice is done according to the circumstances. It is a doctrine of wide utility and has been resorted to in

varying fact patterns to achieve justice. The maxim 'estoppel may be used as a shield but not a sword' does not limit the doctrine of estoppel to defendants alone. Plaintiffs too may have recourse to it. Estoppel may assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact which would destroy the cause of action.

It is however to be observed that the facts and circumstances prevailing in *Boustead Trading, supra,* were vastly different from the facts of the case in the instant originating summons.

The facts in the instant case were not confined to the defendant's letter dated 22 May 1982. The facts prevailing in the instant case as affirmed in the defendant's affidavits were far more comprehensive and pervasive than that letter alone, because the plaintiff has on 1 August 1980 executed a loan agreement and deed of assignment.

Clause 6(a) of the loan agreement provides that the interest payable on the facility shall be simple interest calculated at the rate of 4% per annum with monthly rests. However cl. 6(a) is to be read with cl. 6(d) thereof which provides as follows:

> (d) Notwithstanding Clause 6(a) the Lender may from time to time by a notice in writing of its intention so to do increase or reduce the rate of interest payable hereunder and in regard thereto the following provisions shall apply and have effect:
>
> (i) Any increase or decrease in the rate of interest shall take effect and be payable as from the date specified in the said notice and shall be calculated as herein before provided.
>
> (ii) *In lieu* of the monthly instalments referred to in Clause 2 the Borrower shall as from the expiry of such notice pay such increased or reduced monthly instalments as shall be appropriate having regard to the alteration effected in the rate of interest payable.
>
> (iii) The Borrower may at his option elect to treat such notice as a notice requiring payment of all moneys due under this Agreement but in that event he shall give written intimation of such election to the Lender within one month of the date of service of the notice and shall on the expiration of the notice pay to the Lender all moneys due under this Agreement.
>
> (iv) The decision of the Lender as to what at any time is the rate of interest chargeable shall be final and conclusive and shall not be questioned on any account whatsoever.

Upon a proper perusal and construction of the aforesaid cl. 6(a) read with cl. 6(d), it appears plain to me that notwithstanding the rate of interest provided

under cl. 6(a), the defendant as lender reserves the right from time to time by a notice in writing evincing an intention to increase or reduce the said rate of interest.

The defendant's affidavit in encl. (4) exh. SH7 affirmed that the defendant had by way of a written notice dated 31 January 1985 informed the plaintiff that the rate of interest has been increased to 12% per annum, with effect from February 1985 with a monthly instalment of RM1,525.56. This written notice in my view is consistent with the aforesaid cl. 6(d) of the loan agreement. Also pursuant to the same cl. 6(d), the defendant has by way of another written notice dated 3 January 1989 to the plaintiff informed the plaintiff that the interest rate has been reduced to 9% per annum. In my judgment, these written notices are within the ambit of and consistent with the said cl. 6(d) and they constituted expressions of the rights reserved to the defendant under the loan agreement and by no stretch of imagination can they be construed as defendant's breaches of the loan agreement.

Where a loan agreement which is the charge document in the instant case has been executed by the plaintiff in the presence of the plaintiff's solicitors and such a charge document provides for a variation of interest as in cl. 6(d) above, the plaintiff could not be heard to say that the variation of interest by the defendant *vide* the aforesaid written notices constituted a unilateral act: see also *Foo Yoke Choon v. Public Bank Bhd* [2000] 3 CLJ 405 CA which was cited in support of the defendant's contention.

The judgment of Abdul Hamid bin Embong JC (now J) in *Kerajaan Malaysia v. Mohd Mokhtar Ali* [1996] 1 CLJ 816 is illuminating in that the facts in that case are substantially the same as those in the instant case. There, the defendant's land was charged to the plaintiff on 17 September 1982 as security for the payment to the plaintiff of a government loan extended by the plaintiff to the defendant as a public servant. The defendant resigned from public service on 10 March 1983. On 23 March 1983, the plaintiff by way of letter to the defendant allowed the defendant to repay the loan by original instalments as usual at RM339.44 monthly for 298 months.

Subsequently, the defendant by way of notice dated 31 January 1985 informed the defendant that the interest rate for his housing loan has been raised to 10% per annum with effect from 1985 and due to that his monthly instalment has been increased to RM568.77 per month. By a notice dated 20 June 1987, the interest rate was reduced from 10% to 9% per annum with effect from 1 July 1987. Thereafter by a notice dated 3 January 1989, the interest rate was further reduced from 9% to 7% per annum. The defendant's several appeals against the increase in the interest rate were rejected by the plaintiff.

The defendant raised the issue of estoppel in that the plaintiff had allowed him to continue with the outstanding repayment at RM339.44 monthly for 298 months and that the upward variation of interest to 10% *vide* the plaintiffs letter dated 31 January 1985 was contrary to the representation made by the plaintiff *vide* letter dated 23 March 1983. There was also a clause in the charge document reserving to the plaintiff the right to vary the rate of interest.

His Lordship in a well-considered judgment held, *inter alia*, as follows:

> In my view, even though the plaintiff had permitted the defendant to continue with the housing loan which he had obtained as a government servant, *vide* Exh C, that permission did not preclude the plaintiff from enforcing the terms of the charge as stipulated in the aforecited clauses. Interest rates may be increased or reduced by the plaintiff as chargee upon notification to the defendant chargor. If the defendant's proposition that the plaintiff was estopped from varying the interest rate were correct, then a situation would arise that whilst the government may vary upwards interests on housing loans of serving government servants, it may not do so in respect of loans taken by those who had resigned from government service. This is ludicrous as it is unjust. Clearly this is not what is intended by clauses 5 and 6 stated above.
>
> It is my considered opinion that there can be no other construction to the said clauses than that of giving the plaintiff chargee an unfettered right to vary the interest "at any time and from time to time". Of course, whenever there is a downward variation of the interest the defendant also stood to gain as well. This benefit to the defendant was clearly demonstrated when the interest rate on his loan was reduced from 10% per annum to 9% per annum with effect from 1 July 1987, and subsequently to the current 7% per annum as of 1 January 1989 (see Exh. LYG2A, 2B, 2C, encl. 28).

I am in entire agreement with the above judgment and therefore hold that the plaintiffs contention that estoppel operated against the defendant in the instant case cannot be sustained.

Limitation

The second and final issue raised by the plaintiff is that the defendant by notice of demand dated 29 July 2002 has manifested an intention to breach the term of repayment imposed on the plaintiff and so the plaintiff relies on ss. 21(1), (2) and (5) and 33 of the Limitation Act 1953 to preclude the defendant from taking any action against the plaintiff, adding that the defendants have delayed and cannot now choose to resurrect by notice of demand dated 29 July 2002 a cause of action which he said has long since died and which the law and justice precludes from enforcing.

The response of the defendant is that the plaintiff's submission on limitation is premature at this stage as the defendant has yet to take action under s. 256 of the National Land Code 1965 and O. 83 of the Rules of the High Court 1980.

By way of general observation, in my view, it is settled law that consistent with s. 33 of the Limitation Act 1953, the provisions of the Act shall apply to proceedings by or against the government. I shall now consider ss. 21(1), (2) and (5) of the Limitation Act 1953 raised by the plaintiff.

Section 21(1) provides as follows:

> (1) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on land or personal property or to enforce such mortgage or charge, or to recover proceeds of the sale of land or personal property after the expiration of twelve years from the date when the right to receive the money accrued.

This subsection disallows an action to recover any principal sum of money secured eg, by a charge on land, or to enforce the charge or to recover proceeds of the sale of land after the expiration of 12 years from the date when the right to receive the money accrued. Section 21(1) is relevant and applicable eg, when an action has been brought by the defendant as the chargee to recover the facility or to enforce the charge. The originating summons herein was brought by the plaintiff as the chargor and as it was not brought by the defendant as the chargee for the purposes as stated in s. 21(1), it is difficult to see the relevance or applicability of the defence of limitation under s. 21(1). I agree with the submission for the defendant that it is premature for the plaintiff to raise it at this stage of the originating summons.

The plaintiff also raised s. 21(2) of the same Act which reads as follows:

> (2) No foreclosure action in respect of mortgaged personal property shall be brought after the expiration of twelve years from the date on which the right to foreclose accrued:
>
> Provided that if, after that date the mortgagee was in possession of the mortgaged property, the right to foreclose on the property which was in his possession shall not, for the purposes of this subsection, be deemed to have accrued until the date on which his possession discontinued.

In my judgment, as in the case of s. 21(1), s. 21(2) is relevant only when the defendant as chargee has brought a foreclosure action under s. 256 of the National Land Code 1965 and O. 83 of the Rules of the High Court 1980 in respect of the charge in question. In the absence of such a foreclosure action,

there is no doubt in my mind that the provisions of s. 21(2) is not even remotely relevant and so would require no further consideration or deliberation by me.

Section 21(5) which was relied on by the plaintiff is reproduced as follows:

> (5) No action to recover arrears of interest payable in respect of any sum of money secured by a mortgage or other charge or payable in respect of proceeds of the sale of land, or to recover damages in respect of such arrears shall be brought after the expiration of six years from the date on which the interest became due:

This is yet another similar situation of prematurely raising the issue of limitation as the defendant as chargee in the instant case has not brought any action to recover arrears of interest payable in respect of the charge in question. The defendant is the party against whom the plaintiff is seeking the aforesaid declaratory relief.

At this juncture, for purposes of completeness, it is necessary to observe that the plea of limitation has to be established or proved, by adducing *viva voce* evidence in support thereof, instead of mere affidavit evidence. To adjudicate upon the plea of limitation would involve the taking of further evidence. Hence, in *Re Wan Ahmad Nasir bin Ngah Ibrahim, dec* [1935] MLJ 60, the plea of limitation failed because no evidence was adduced in support thereof.

In any event, I am unable to see how the plea of limitation could militate against the defendant as the facility was and is in the form of a continuing account, in which case the period of limitation would not begin to run until a demand has been made by the defendant. In the instant case, the defendant's notice of demand for the payment of RM207,883.34 by the plaintiff was issued to the plaintiff on 8 March 2002 in which case 11 months have elapsed and so it is still within any of the limitation periods prescribed in the aforesaid provisions of s. 21(1), (2) and (5).

Conclusion

By reason of the foregoing grounds, I hold that the plaintiff's originating summons is devoid of merits and is hereby dismissed with costs.